

STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

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SAC, ALBANY OFFICE

In re:

Request for Regulatory	)	1998 OAL Determination No. 14
Determination filed by	)	[Docket No. 91-011]
MARY HUGHES concerning	)	
various rules of the	)	August 12, 1998
EMPLOYMENT	)	
DEVELOPMENT	)	Determination Pursuant to
DEPARTMENT regarding the	)	Government Code Section 11340.5;
collection of unpaid taxes	)	Title 1, California Code of
	)	Regulations, Chapter 1, Article 3

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**Determination by: EDWARD G. HEIDIG, Director**

HERBERT F. BOLZ, Supervising Attorney  
DEBRA M. CORNEZ, Staff Counsel  
Regulatory Determinations Program

**SYNOPSIS**

The issue presented to the Office of Administrative Law is whether various rules of the Employment Development Department concerning the collection of unpaid taxes are "regulations" and therefore without legal effect unless adopted in compliance with the Administrative Procedure Act ("APA").

The Office of Administrative Law has concluded that Rules 1, 2 and 3 are "regulations," and are required to be adopted pursuant to the APA, and that Rules 4 through 9 are not "regulations" subject to the APA.

*6*

## ISSUE

The Office of Administrative Law has been requested<sup>1</sup> to determine<sup>2</sup> whether various rules of the Employment Development Department concerning the collection of unpaid taxes are "regulations" required to be adopted pursuant to the Administrative Procedure Act ("APA").<sup>3,4</sup>

## ANALYSIS

The California Employment Development Department ("Department" or "EDD") provides many services. It acts as a broker between employers and job seekers; pays benefits to eligible unemployed or disabled persons; collects payroll taxes; helps disadvantaged persons to become self-sufficient; gathers and shares information on California's labor markets; administers the Job Training Partnership Act program; and ensures that these activities are coordinated with other organizations that also provide employment, training, tax collection and benefit payment services.<sup>5</sup>

This request for determination was filed by Mary E. Hughes ("requester").<sup>6</sup> The requester asked OAL to issue a determination regarding nine alleged EDD rules concerning the collection of unpaid taxes. The rules are stated in substance in the words used by the requester as follows:

- Rule 1. An EDD tax compliance representative has no responsibility to negotiate a payment plan upon the request of a tax debtor.
- Rule 2. An EDD tax compliance representative can mandate that the payment of tax debts be paid within 60 to 90 days.
- Rule 3. A tax debtor, when meeting with a tax compliance representative, is not allowed to make a tape recording of the meeting; it is not permitted.
- Rule 4. EDD tax compliance representatives have no responsibility to advise tax debtors of any rights the debtor has under EDD's own regulations, other law or case law, or provide such information upon request by the tax debtor.

- Rule 5. EDD does not provide a tax debtor with information on regulations that EDD staff are required to adhere to in doing their jobs, even if the tax debtor specifically asks for this information.
- Rule 6. EDD can threaten to seize business and/or personal assets to coerce a tax debtor to enter into a repayment agreement.
- Rule 7. EDD can place a lien against a tax debtor, and can place a levy on a tax debtor's bank accounts, without a hearing which is subject to appeal before a court of competent jurisdiction.
- Rule 8. EDD tax compliance representatives have no responsibility to respect due process rights of a tax debtor afforded under the Fourteenth Amendment of the Constitution of the United States of America.
- Rule 9. a. EDD can say in print to a tax debtor, "A state tax lien has been filed against you as a result of your continued failure to pay your tax liability. If the amount is not paid immediately, additional involuntary collection action may be initiated, which includes seizure and sale of your business and/or personal property."
- b. An EDD tax compliance representative can say verbally "This debt must be taken care of in 60 to 90 days."

For purposes of analysis, it is important to note that all of the challenged rules are *unwritten rules or policies* which EDD is allegedly utilizing or enforcing to implement its tax collection procedures.

**A. Is the APA Generally Applicable to the Employment Development Department ?**

The Department has been granted general rulemaking authority pursuant to Unemployment Insurance Code section 305, which states:

*"Regulations for the administration of the functions of the Employment Development Department under this code shall be adopted, amended, or*

repealed by the Director of Employment Development *as provided in [the APA]*. [Emphasis added.]”<sup>7</sup>

Clearly, the APA applies to the Department’s rulemaking.<sup>8</sup>

**B. Do the Challenged Rules Constitute "Regulations" Within the Meaning of Government Code Section 11342?**

The key provision of Government Code section 11342, subdivision (g), defines the term “regulation” as follows:

“‘Regulation’ means *every* rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any such rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure . . . . [Emphasis added.]”

Government Code Section 11340.5, subdivision (a), provides as follows:

“*No state agency shall issue, utilize, enforce or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in subdivision (g) of Section 11342 unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]. . . . [Emphasis added.]*”

In *Grier v. Kizer*,<sup>9</sup> the California Court of Appeal upheld OAL's two-part test<sup>10</sup> as to whether a challenged agency rule is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (g):

First, is the challenged rule either:

- a rule or standard of general application, *or*
- a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either:

- implement, interpret, or make specific the law enforced or administered by the agency, or
- govern the agency's procedure?

If an uncodified rule fails to satisfy either of the above two parts of the test, we must conclude that it is *not* a "regulation" and *not* subject to the APA. In applying the two-part test, however, we are guided by the *Grier* court:

"... because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead, supra*, 22 Cal.3d at p. 204, 149 Cal.Rptr. 1, 583 P.2d 744), we are of the view that *any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA*. [Emphasis added.]"<sup>11</sup>

1. **First, is the challenged rule either a rule or standard of general application or a modification or supplement to such a rule?**

Challenged Rule 1: An EDD tax compliance representative ("TCR") has no responsibility to negotiate a payment plan upon the request of a tax debtor.

In its response, EDD provided the following explanation regarding the process of negotiation of a payment plan for paying off tax debts:

"EDD does allow negotiation of a payment plan to pay off a tax debt. But, EDD will only accept a payment plan when the employer does not have sufficient assets to pay the amount due in full as shown by a financial statement. *Once EDD has a financial statement showing that the debtor does not have sufficient assets, negotiation of a payment plan by the field staff does occur. The Department agrees that requiring a taxpayer to show that he is unable to pay the tax debt before negotiating a payment plan is a rule or standard of general application applied throughout the state and that it does implement the tax collection responsibilities administered by EDD . . . .*

"But, requiring that a taxpayer show that he or she does not have sufficient assets to pay the tax debt is an internal management directive to our

collection staff to prevent them from wasting staff time searching for and attempting to attach assets when such assets do not exist. When that circumstance is established, it is more cost efficient for our collection staff to look for other means to accomplish collection, which is the negotiation of a payment plan. A payment plan also affects the employer because when a payment plan is in effect, the Department generally does not levy on assets it has found to partially satisfy the debt. Establishing that there are insufficient assets to pay the tax amount in full operates to the benefit of the employer because he is not subject to involuntary collection action under [UIC] section 1755 and 1785 and operates to the benefit of the Department because it is not wasting time looking for assets and attempting to collect assets that will not be sufficient to pay the tax debt. Without a financial statement, the field staff have no factual basis to negotiate a payment plan. *All this internal management directive does is tell the field staff that they must have a factual basis to negotiate.* [Emphasis added.]”

OAL agrees with EDD’s statement that Rule 1 is a rule or standard of general application. For an agency policy to be of “general application,” it need not apply to all citizens of the state. It is sufficient if the rule applies to members of a class, kind or order.<sup>12</sup> Rule 1 affects taxpayers statewide in determining whether the taxpayer may negotiate a payment plan for the debt owed, and therefore, is a rule or standard of general application.

Challenged Rule 2: An EDD tax compliance representative (“TCR”) can mandate that the payment of tax debts be paid within 60 to 90 days.

The requester explains that after she arranged a payment agreement with the State Board of Equalization for what was owed to that agency, she met with a Department TCR to attempt to arrange a similar payment plan for what was owed to that agency. The requester states:

“The TCR repeatedly stated that the amount must be paid within 60 to 90 days. [Par.] I told the TCR that it would not be possible for me to do this. [Par.] The TCR told me to go home and talk to my husband and get back to him . . . .”

In its response to Rule 2, EDD stated:

"All tax debts are due and payable when they become delinquent and are subject to collection at that time (UIC secs. 1703, 1755 and 1785). In 1991, payment plans could be accepted without a financial statement if the payment plan did not exceed 90 days. *Allowing payment plans for less than 90 days without a financial statement was a general standard applied statewide implementing the tax collection responsibilities of the Department.*

"Allowing a payment proposal to be entered into for a short period such as 90 days is an internal management rule designed to lessen the administrative burdens on the Department and the debtor so that when payment can be affected that soon, neither the employer nor the Department expends the administrative cost and energy to search for assets, levy on assets, prepare a financial statement or review a financial statement. This rule relieves the debtor and the Department from unnecessary administrative costs when debts can be promptly paid. [Emphasis added.]"

From the information the requester and EDD provided, it appears that the payment plan the requester proposed was not accepted because either it was for a time period beyond 90 days, or, if it was for less than 90 days, the requester had not first provided a financial statement. OAL finds that either rule is a standard of general application, which EDD also acknowledged in its response. EDD argues that the rule is designed merely "to lessen the administrative burdens on the Department and the debtor." Even assuming this is the case, the rule is nonetheless a standard of general application.

Challenged Rule 3: A tax debtor, when meeting with a tax compliance representative, is not allowed to make a tape recording of the meeting; it is not permitted.

According to the requester, her husband, Robert Hughes, met with a TCR to discuss the collection of unpaid taxes. Before the meeting began, Mr. Hughes asked the TCR if he had any objections to having the meeting recorded. The TCR replied that he had no objections. The meeting was started and lasted about 25 minutes. The requester provided a partial transcript of a tape recording that was made during this meeting between Mr. Hughes and the TCR:

"TCR: Another thing that I wanted to mention to you, you can consult your attorneys on this, but *we have been advised by our legal department in*

*Sacramento, that your request for taping this [conversation] is not permissible. [Emphasis added.]*

“RH: Not permissible?

“TCR: It’s not allowed.

“RH: Well we better turn it off then, because . . . I ah, if our meeting is over I will turn it off then.”

In its response, EDD states that Penal Code section 632 makes it a crime to tape record a confidential communication without the consent of all parties; that a discussion between a tax debtor and a tax collector concerning collection of unpaid tax amounts is a confidential communication pursuant to Unemployment Insurance Code (“UIC”) sections 1094 and 2111. EDD states in part:

“EDD does not consent to tape recording of meetings between tax debtors and compliance representatives. EDD’s *policy not to give consent is [a] statewide standard of general application* but it is not implementing, interpreting or making specific the statutes it enforces. The Penal Code is not a statute enforced by EDD. While the Penal Code does give EDD discretion to consent or not consent, an exercise of discretion granted by that code section is not interpreting the code section, but merely complying with the code section. [Emphasis added.]”

OAL agrees with EDD’s acknowledgment that EDD’s policy not to give consent is a standard of general application; it applies to all meetings between EDD tax compliance representatives and tax debtors statewide.

OAL finds that Rules 1, 2 and 3 are rules or standards of general application.

Challenged Rule 4: EDD tax compliance representatives have no responsibility to advise tax debtors of any rights the debtor has under EDD’s own regulations, other law or case law, or to provide such information upon request by the tax debtor.

The requester states that TCRs do not have the responsibility to advise tax debtors of their rights under the law and apparently refuse to provide such information

When a tax debtor requests the information.

This assertion by the requester seems to be a complaint about alleged inappropriate behavior by an EDD employee. The requester's statement is so vague and incomplete that OAL finds that the requester has not articulated a rule or standard of general application to which the two-prong *Grier* test can be applied.

Challenged Rule 5: EDD does not provide a tax debtor with information on regulations that EDD staff are required to adhere to in doing their jobs, even if the tax debtor specifically asks for this information.

This statement by the requester also appears to be a complaint about alleged inappropriate behavior by an EDD employee. It, too, does not articulate a rule or standard of general application to which the two-prong analysis can be applied.

Challenged Rule 6: EDD can threaten to seize business and/or personal assets to coerce a tax debtor to enter into a repayment agreement.

In its response, EDD asserts that:

"EDD is authorized to levy on a debtor's assets held by a third person with a notice of levy pursuant to UIC section 1755 and to seize debtor's property in the hands of the debtor with a warrant for collection pursuant to UIC section 1785. The Department does inform tax debtors that it has those collection remedies to involuntarily collect taxes which have not been paid. Those involuntary collection actions are, by their nature, coercive and intended to force payment of taxes owed. The Department has no specific policy to 'threaten' the use of those involuntary collection procedures, but the Department does inform taxpayers that those involuntary collection actions can be taken by the Department if taxes are not paid. Such information is *only the explanation of the operative effect* of the Code section referenced and it is not an interpretation of those Code sections. The Department is informing the debtor of the *application* of those code sections to the factual situation of the debtor. [Emphasis added.] "

OAL agrees that merely explaining the operative effect of the applicable law does

not further interpret or supplement the law. Explaining the application of the law without further interpretation or supplementation is not a rule or standard of general application.

Challenged Rule 7: EDD can place a lien against a tax debtor, and can place a levy on a tax debtor's bank accounts, without a hearing which is subject to appeal before a court of competent jurisdiction.

The requester's seventh challenged rule appears to address a specific action by EDD.

In its response, EDD asserts that:

"EDD action in this regard is directed by its authorizing statutes and is not based on a policy interpretation of the statutes it administers.

". . . In short, the statutes provide that an assessment is final without a review by Superior Court. A review by Superior Court is provided in UIC section 1241 and only occurs after payment of the tax and denial of a claim for refund. (*Masi v. Nagle* (1992) 5 Cal.App.4 608, 7 Cal.Rptr.2d 423.) A court action cannot stop the collection of a tax (UIC sec. 1851). So, the liability established in an assessment cannot be challenged in court before the tax is collected or paid.

" . . . .

"The lien placed upon a tax debtor for delinquent taxes and the collection by a Notice of Levy on a bank account is authorized by UIC sections 1703 and 1755 to be carried out without a hearing before a court. EDD's action in that regard is the *implementation* of UIC sections 1703 and 1755 and does not reflect a policy interpretation by EDD to avoid a court hearing. . . . [Emphasis added.]"

OAL interprets EDD's response to mean that by "implementation" of UIC provisions EDD is merely complying with the applicable law and not further implementing, interpreting or supplementing the law. Merely complying with governing law does not constitute a rule or standard of general application that meets the definition of "regulation" under Government Code section 11342.

Challenged Rule 8:

EDD tax compliance representatives have no responsibility to respect due process rights of a tax debtor afforded under the Fourteenth Amendment of the Constitution of the United States of America.

The requester alleges that TCRs “have *no responsibility to respect* due process rights of a tax debtor.” (Emphasis added.) It is not clear if the requester is challenging a Department rule or alleging inappropriate behavior by an EDD employee. If the requester’s statement is intended to state a rule, it is too vague to analyze under the two-prong *Grier* test.

If the requester is alleging inappropriate behavior by an EDD employee, then as noted above, this is not an articulation of a rule or standard of general application. If this is an attempt by the requester to ask OAL to determine whether the employee’s behavior violated the requester’s constitutional rights, then this is not a question of rulemaking law and is beyond OAL’s jurisdiction. OAL is not a court with jurisdiction over constitutional claims.

Challenged Rule 9:

a. EDD can say in print to a tax debtor, “A state tax lien has been filed against you as a result of your continued failure to pay your tax liability. If the amount is not paid immediately, additional involuntary collection action may be initiated, which includes seizure and sale of your business and/or personal property.”

b. An EDD tax compliance representative can say verbally “This debt must be taken care of in 60 to 90 days.”<sup>13</sup>

The requester’s allegation, Rule 9a, also deals with alleged action taken by EDD concerning tax collection procedures, including the seizure and sale of business and/or personal property for continued failure to pay tax liability.

EDD responded:

“When taxes become due and payable, a statutory lien is established against the taxpayer pursuant to UIC section [1703] . . . . When taxes under the [UIC] are due and payable, UIC section 1755 allows EDD to levy on the assets of the debtor held by third parties and UIC section 1785 allows EDD

to seize assets in possession of the debtor to satisfy the taxes which are due, payable, but not paid.

“EDD’s action in seizing and selling business and personal property for the failure to pay tax liability is the implementation of UIC sections 1703, 1755 and 1785 and is not the result of a policy interpretation of the statutes it administers.”

For the same reasons explained under Rule 7, above, OAL finds that EDD’s action was merely an application of existing law. Merely complying with governing law does not constitute a rule or standard of general application that meets the definition of “regulation” under Government Code section 11342.

In regards to Rule 9b, a similar rule was challenged under Rule 2 and was found to be a rule or standard of general application, but in Rule 9b, the requester’s focus seems to be on the EDD employee’s behavior, on what the employee said. As discussed above in Rules 4 and 5, challenging an employee’s behavior does not articulate a rule or standard of general application.

OAL, therefore, concludes that Rules 4 through 9 are not rules or standards of general application, and therefore, do not meet the definition of “regulation.” Next, we will discuss whether Rules 1 through 3 satisfy the second prong of the two-part test.

2. **Second, have the challenged rules been adopted to implement, interpret or make specific the law enforced or administered by the agency or govern the agency's procedure?**

Section 301 of the Unemployment Insurance Code provides in part:

“... The [EDD] shall be administered by an executive officer known as the Director of Employment Development who is vested with the duties, purposes, responsibilities, and jurisdiction heretofore exercised by the Director of Benefit Payments with respect to the following *functions*:

“....

“(c) Determination of contribution rates and the *administration and*

*collection of contributions, penalties and interest, including but not limited to filing and releasing liens. . . . [Emphasis added.]”*

Unemployment Insurance Code section 305 states:

*“Regulations for the administration of the functions of the [EDD] under this code shall be adopted, amended, or repealed by the Director of [EDD] as provided in [the APA]. [Emphasis added.]”*

Unemployment Insurance Code section 306 further provides:

The Director of [EDD] may adopt, amend, or repeal such regulations as **are** reasonably necessary to *enforce his functions* under this code. [Emphasis added.]”

#### Challenged Rules 1 and 2

As UIC section 301 provides above, EDD is responsible for collecting payroll taxes from employers. OAL finds that Rules 1 and 2, concerning the negotiation of payment plans for the collection of the amount of tax owed, implement and make specific this tax collection provision of the UIC that is administered or enforced by EDD. OAL agrees with EDD that Rules 1 and 2 “implement the tax collection responsibilities administered by EDD.” Therefore, OAL finds that Rules 1 and 2 are “regulations” within the meaning of Government Code section 11342.

#### Challenged Rule 3

EDD argues that it is merely exercising its discretion to not consent to the recording of confidential communications between EDD representatives and tax debtors as allowed by Penal Code section 632. EDD asserts that:

*“EDD’s policy not to give consent is [a] statewide standard of general application but it is not implementing, interpreting or making specific the statutes it enforces. The Penal Code is not a statute enforced by EDD. While the Penal Code does give EDD discretion to consent or not consent, an exercise of discretion granted by that code section is not interpreting the code section, but merely complying with the code section. [Emphasis added.]”*

OAL disagrees with EDD's argument. EDD's rule is a blanket prohibition of taxpayer recordings. This is a statewide rule intended to implement or make specific the tax collection functions administered and enforced by EDD, as noted in UIC sections 301, 305 and 306, above, *and* to govern EDD collection procedures.

Additionally, Sections 1703 and 1785 of the UIC specifically provide EDD with the collection and enforcement powers to collect any tax owed under the UIC. Section 1703 states in part:

"(a) If any employing unit or other person fails to pay any amount imposed under this division [Division 1. 'Unemployment and Disability Compensation,' commencing with section 100, of the UIC] at the time it becomes due and payable, the amount thereof, including penalties and interest, together with any costs, shall be a perfected and enforceable state tax lien. . . ."

Section 1785 provides:

"If any amount required to be paid under this division [Division 1. 'Unemployment and Disability Compensation,' commencing with section 100, of the UIC] is not paid when due, the director . . . may . . . issue a warrant for the *enforcement* of any liens and for the *collection* of any amount required to be paid to the state under this division. . . . [Emphasis added.]"

Clearly, discussions between a tax debtor and an EDD tax compliance representative concerning the collection of unpaid taxes are part of the tax collection process, a function administered and enforced by EDD. The prohibition of taxpayer recordings is a policy intended by EDD to govern discussions or meetings between tax debtors and EDD that are part of the tax collection process. In other words, this prohibition governs EDD's *procedure*, thus satisfying the second alternative in the second prong of the two-part test:

"'Regulation' means every rule . . . adopted by any agency . . . to *govern* its procedure. . . . [Emphasis added.]"

Assuming that Penal Code section 632 even applies, and that EDD is exercising its discretion to consent or to not consent, EDD is still nonetheless utilizing a rule

adopted to govern its statutory tax collection functions. EDD's argument that it is merely exercising its discretion does not free EDD from following the APA.

In *Engelmann v. State Board of Education*,<sup>14</sup> the Board argued that the enabling statute<sup>15</sup> provided that the Board "may" adopt regulations governing textbook selection and that this signified the Legislature's lack of intent to *require* the Board to comply with the APA when issuing textbook selection guidelines. The court held that the statute did not mandate the Board to adopt regulations, but that once the Board decided to exercise its discretion to issue general rules implementing the statute, that exercise of discretion implicated the APA.<sup>16</sup>

In its response, EDD concedes that prohibiting taxpayer recordings is a rule or standard of general application. OAL finds also that this rule implements or makes specific the law administered or enforced by EDD. Indeed, this prohibition satisfies both of the two statutory alternatives--the rule not only (1) implements, interprets and makes specific the law enforced by the agency, it also (2) governs agency procedure.

OAL notes that EDD provided three reasons as the basis for its policy of prohibiting taxpayer recordings:

"a) We do not know if the person handling the tape recorder is competent in its use and, therefore, there is no assurance that a full and accurate conversation would be recorded;

"b) There is no independent and reliable control of the tape after the recording has been made so that we have no assurance that the tape has not been tampered with when it is later played. Without a reliable chain of control of the tape, we cannot be confident that the conversation now on the tape has not been modified; and

"c) The tax debtor is an interested party in a dispute with EDD. While at the time that taxes are ready for collection, the debt must be final and not subject to a current administrative or court review, we are discussing the collection of a debt which discussions are often contentious and in the nature of a dispute. Allowing an interested party to maintain the custody of such a recording makes it inherently unreliable."

These reasons may lend significant support to a proposal to adopt a regulation

prohibiting taxpayer recordings; they do not, however, support a conclusion that the rule is not required to be adopted pursuant to the APA.

OAL concludes that Rules 1, 2 and 3 meet the definition of "regulation" pursuant to Government Code section 11342, and therefore, violate Government Code section 11340.5.

C. **Do the Challenged Rules Found to be "Regulations" Fall Within Any Established General Exception to APA Requirements?**

Generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless *expressly* exempted by statute.<sup>17</sup> Rules concerning certain specified activities of state agencies are not subject to the procedural requirements of the APA.<sup>18</sup> EDD appears to argue that challenged Rules 1 and 2 fall within the general exception concerning "internal management."

INTERNAL MANAGEMENT

Government Code section 11342, subdivision (g), expressly exempts rules concerning the "internal management" of *individual* state agencies from APA rulemaking requirements:

"'Regulation' means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any such rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, *except one that relates only to the internal management of the state agency.* [Emphasis added.]"

*Grier v. Kizer* provides a good summary of case law on internal management. After quoting Government Code section 11342, subdivision (b), the *Grier* court states:

"*Armistead v. State Personnel Board* [citation] determined that an agency rule relating to an employee's withdrawal of his resignation did not fall within the internal management exception. The Supreme Court reasoned the rule was 'designed for use by personnel officers and their colleagues in the various state agencies throughout the state. It interprets and implements [a board rule]. It concerns termination of employment, a matter of import to

all state civil service employees. It is not a rule governing the board's internal affairs. [Citation.] 'Respondents have confused the internal rules which may govern the department's procedure . . . and *the rules necessary to properly consider the interests of all . . . under the statutes. . .*' [Fn. omitted.] . . . [Citation; emphasis added by *Grier* court.]

"*Armistead* cited *Poschman v. Dumke* [citation], which similarly rejected a contention that a regulation related only to internal management. The *Poschman* court held: 'Tenure within any school system is a matter of serious consequence involving an important public interest. The consequences are not solely confined to school administration or affect only the academic community.' . . . [Citation.][<sup>19</sup>]

"Relying on *Armistead*, and consistent therewith, *Stoneham v. Rushen* [citation] held the Department of Corrections' adoption of a numerical classification system to determine an inmate's proper level of security and place of confinement 'extend[ed] well beyond matters relating solely to the management of the internal affairs of the agency itself[,] and embodied 'a rule of general application significantly affecting the male prison population' in its custody. . . .

"By way of examples, the above mentioned cases disclose that the scope of the internal management exception is narrow indeed. This is underscored by *Armistead's* holding that an agency's personnel policy was a regulation because it affected employee interests. Accordingly, even internal administrative matters do not per se fall within the internal management exception. . . ." <sup>20</sup>

In its response, EDD argues that Rule 1 is:

"an *internal management* directive to our collection staff to prevent them from wasting staff time searching for and attempting to attach assets when such assets do not exist. [Emphasis added.]"

EDD further argues that Rule 2 is:

"an *internal management* rule designed to lessen the administrative burdens on the Department and the debtor . . . . [Emphasis added.]"

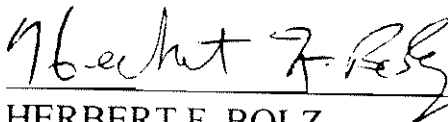
As noted above, Rules 1 and 2 affect not only the employees of EDD, but also affect taxpayers who owe a debt to EDD and who wish to negotiate a repayment plan with EDD. Hence, Rules 1 and 2 do not fall within the "internal management" exception.

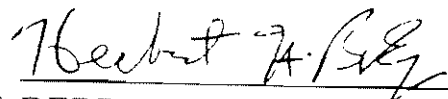
## CONCLUSION

For the reasons set forth above, OAL finds that:

1. The APA is generally applicable to the Department.
2. Rules 1, 2 and 3 have general applicability and (a) implement, interpret or make specific sections 301, 305, 306 and other tax collection provisions of the Unemployment Insurance Code, and (b) govern EDD's tax collection procedure.
3. Rules 4 through Rule 9 do not meet the definition of "regulation" pursuant to Government Code section 11342.
4. No general exceptions to the APA requirements apply to Rules 1, 2 or 3; and
5. Rules 1, 2 and 3 violate Government Code section 11340.5, subdivision (a).

DATE: August 12, 1998

  
HERBERT F. BOLZ  
Supervising Attorney

  
for DEBRA M. CORNEZ  
Staff Counsel

**Office of Administrative Law**  
555 Capitol Mall, Suite 1290  
Sacramento, California 95814  
(916) 323-6225, CALNET 8-473-6225  
Telecopier No. (916) 323-6826  
Electronic mail: [staff@oal.ca.gov](mailto:staff@oal.ca.gov)

## ENDNOTES

1. This request for determination was filed by Mary E. Hughes, 360 Wisconsin #202, Long Beach, CA 90814. The Employment Development Department responded to the request and was represented by David E. Johnson, Assistant Chief Counsel, 800 Capitol Mall, P.O. Box 826880, Sacramento, CA 94280-0001, (916) 653-0707.

On May 8, 1998, OAL published a summary of this request for determination in the California Regulatory Notice Register (CRNR) 98, No.19-Z, May 8, 1998, p. 941, along with a notice inviting public comment. Except for EDD's response, no comments were received pursuant to this notice.

2. Title 1, California Code of Regulations ("CCR") (formerly known as the "California Administrative Code"), subsection 121(a), provides:

"*Determination*' means a finding by OAL as to whether a state agency rule is a 'regulation,' as defined in Government Code section 11342(g), which is *invalid and unenforceable* unless

(1) it has been adopted as a regulation and filed with the Secretary of State pursuant to the APA, or,

(2) it has been exempted by statute from the requirements of the APA."  
(Emphasis added.)

See *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, review denied (finding that Department of Health Services' audit method was *invalid* because it was an underground regulation which should be adopted pursuant to the APA); and *Planned Parenthood Affiliates of California v. Swoap* (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 (now 11340.5) in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b)--now subd. (g)-- yet had not been adopted pursuant to the APA, was "*invalid*"). We note that a 1996 California Supreme Court case stated that it "disapproved" of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577, 59 Cal.Rptr. 2d 186, 198. *Grier*, however, is still authoritative, except as specified by the *Tidewater* court. *Tidewater* itself, in discussing which agency rules are subject to the APA, referred to "the two-part test of the Office of Administrative Law," citing *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, a case which quotes the test from *Grier v. Kizer*.

3. This determination may be cited as "**1998 OAL Determination No. 14.**"

4. According to Government Code section 11370:

"Chapter 3.5 (commencing with Section 11340), Chapter 4 (commencing with

Section 11370), *chapter 4.5* (commencing with Section 11400), and *Chapter 5* (commencing with Section 11500) constitute, and may be cited as, *the Administrative Procedure Act*." [Emphasis added.]

*We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Administrative Regulations and Rulemaking") of Division 3 of Title 2 of the Government Code, sections 11340 through 11359.*

5. The duties and services performed by the Department are set out in the Unemployment Insurance Code, sections 1 through 17002.

6. In her request for determination, Ms. Hughes also requested that OAL find:

"... any and all regulations that permit EDD staff to place a lien against a tax debtor, and/or place a levy against a tax debtor's bank account(s), and/or seize any business and/or personal assets, without first providing for a hearing which is subject to appeal before a court of competent jurisdiction are *unconstitutional*. [Emphasis added.]"

The issue of whether a "regulation" is constitutional is outside the scope of OAL's authority when issuing a determination; therefore, this determination does not address this issue.

7. Unemployment Insurance Code section 305 requires the Director of Employment Development to adopt, amend, or repeal EDD regulations "... as provided in Chapter 4.5 (commencing with Section 11371) of Part 1 of Division 3 of Title 2 of the Government Code."

Section 2 of Statutes 1979, chapter 567, amended by Statutes 1980, chapter 204, section 7, provided:

"Chapter 4.5 (commencing with Section 11371) of Part 1, Division 3, Title 2 of the Government Code is repealed.

"Any reference in any statute of this state to Chapter 4.5 (commencing with section 11371) of Part 1, Division 3, Title 2 of the Government Code shall be deemed to be a reference to Chapter 3.5 (commencing with section 11340) of Part 1 of Division 3 of Title 2 of the Government Code."

8. The APA would apply to the Department's rulemaking even if Unemployment Insurance Code section 305 did not expressly so provide. The APA applies generally to state agencies, as defined in Government Code section 11000, in the executive branch of government, as prescribed in Government Code section 11342, subdivision (a).

9. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251 (see endnote 2: *Grier*, disapproved on other grounds in *Tidewater*).

10. The *Grier* Court stated:

"The OAL's analysis set forth a two-part test: 'First, is the informal rule either a rule or standard of general application or a modification or supplement to such a rule? [Para.] Second, does the informal rule either implement, interpret, or make specific the law enforced by the agency or govern the agency's procedure?' (1987 OAL Determination No. 10, *supra*, slip op'n., at p. 8.) (See endnote 2: *Grier*, disapproved on other grounds in *Tidewater*).

OAL's wording of the two-part test, drawn from Government Code section 11342, has been modified slightly over the years. The cited OAL opinion--1987 OAL Determination No. 10--was published in California Regulatory Notice Register 98, No. 8-Z, February 23, 1996, p. 292.

11. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253 (see endnote 2: *Grier*, disapproved on other grounds in *Tidewater*).

12. *Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552. See *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class).

13. As part of challenged Rule 9, the requester also stated in paragraph 9c.:

"These statements [referring to parts 9a. and 9b.], verbal and written, when considered in combination, appear to be designed to intentionally inflict emotional distress upon tax debtors."

The question of whether EDD's action constitutes intentional infliction of emotional distress is beyond the scope of OAL's jurisdiction.

The requester also listed a tenth rule:

"A tax debtor's ability to pay has no bearing on arrangements to be made, threats to be made, or actions to be taken against the tax debtor."

This statement does not articulate a rule or standard of general application. It appears to be just a statement or complaint, therefore, OAL did not address it as a rule challenged by the requester.

14. (1992) 2 Cal.App.4th 47, 3 Cal.Rptr.2d 264.

15. Section 60206 of the Education Code provides:

"The [Board] *may* adopt appropriate regulations to implement this chapter. These regulations may include a procedure to review district invoices for instructional materials purchases. . . . [Emphasis added.]"

16. The *Engelmann* court held that:  

“... the ‘may’ in section 60206 [was not] an express limitation of the APA, since it applies only to whether regulations are required, not whether the regulations, if promulgated, must comply with the APA. [2 Cal.App.4th at 59.]”
17. Government Code section 11346.
18. The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:
  - a. Rules relating *only* to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (g).)
  - b. Forms prescribed by a state agency or any instructions relating to the use of the form, *except* where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (g).)
  - c. Rules that “[establish] or [fix], *rates, prices, or tariffs.*” (Gov. Code, sec. 11343, subd. (a)(1).)
  - d. Rules directed to a *specifically named* person or group of persons *and* which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)
  - e. Legal rulings *of counsel* issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (g).)
  - f. There is weak authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. *City of San Joaquin v. State Board of Equalization* (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest). The most complete OAL analysis of the “contract defense” may be found in 1991 OAL Determination No. 6, pp. 175-177. Like *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, **1990 OAL Determination No. 6** (Department of Education, Child Development Division, March 20, 1990, Docket No. 89-012), California Regulatory Notice Register 90, No. 13-Z, March 30, 1990, p. 496, rejected the idea that *City of San Joaquin* (cited above) was still good law.
19. *Armistead* disapproved *Poschman* on other grounds. (*Armistead, supra*, 22 Cal.3d at 204, fn. 2, 149 Cal.Rptr. 1, 583 P.2d 744.)
20. (1990) 219 Cal.App.3d 422, 436, 268 Cal.Rptr. 244, 252-253.